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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 173

AMERICAN BOILER MANUFACTURERS ASSOCIATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23–38) is reported at 404 F. 2d 547. The court's earlier opinion (Pet. App. 62–74) is reported at 366 F. 2d 815. The Board's initial decision and order (Pet. App. 42–61) are reported at 154 NLRB 285, and its supplemental decision and order (Pet. App. 75–85) are reported at 167 NLRB No. 79.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39–40) was entered on December 30, 1968, and a

petition for rehearing (Pet. App. 41) was denied on January 29, 1969. On April 23, 1969, Mr. Justice White extended the time for filing a petition for a writ of certiorari until May 29, 1969, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board properly found that the work of fabricating the piping on boilers had traditionally been performed on the job site by contractors' employees represented by the union, so that an agreement between the union and contractors that their employees would not handle factory-assembled boilers was a lawful work preservation agreement not barred by Section 8(e) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151 *et seq.*), are set forth at Pet. App. 86–87.

STATEMENT

A. THE BOARD'S FINDING OF FACTS

The Union[1] represents employees in the St. Paul, Minnesota, area who install plumbing and pipe fitting systems, including boilers. It has a collective bargaining relationship with the St. Paul Association of Plumbing, Heating and Mechanical Contractors, a group of 44 contractors in the St. Paul area. (Pet. App. 64.)

[1] United Association Pipe Fitters Local Union 455.

Prior to the development of packaged boilers,[2] boiler components were shipped separately to the job site, and there fabricated and assembled by the contractor's employees; this provided two days' work for two employees on each boiler (R. 32–33). The use of packaged boilers in the St. Paul area increased significantly in the late 1950's. By 1959,[3] approximately 10 percent of all boilers installed in that area were packaged boilers; by 1963, 60 to 85 percent of all boiler installations were packaged (Pet. App. 64; R. 243, 250–251, 272–273, 293–294, 352–353, 364–365, 369–379).

Since the advent of the packaged boiler thus resulted in a decrease of job-site work, the Union sought in 1959 and 1961, and in their 1963 agreement with the Association finally obtained, a "Fabrication Clause" (Pet. App. 45; R. 109–110, 123–124, 127, 344–346, 355). The clause provides, in pertinent part (Pet. App. 24–25):

> As a primary working condition, it is agreed that all pipe formation, systems, or controls, or component parts thereof, included with the non-purchase list attached hereto and made a part hereof as Exhibit I, as amended from time to time as provided in this agreement, shall be fabricated on the job site or in the shop of an Employer within the bargaining unit who is bound by this agreement, except as otherwise

[2] A "packaged" boiler is one to which all external, or "trim" piping, such as water column, fuel piping, etc., is attached at the factory prior to shipment (R. 29–30). ("R" references are to the Joint Record in the court below.)

[3] The "mid-1940" date in the opinion of the court below (Pet. App. 24) is in error.

mutually agreed upon with relation to any particular job.

* * * * *

EXHIBIT I.

Non-Purchase List

* * * * *

2. On boilers, all piping beyond the gas and oil burners proper and trim piping on those boilers 30 horsepower or more.

The agreement also established a "Fabrication Committee," composed of representatives of the Union, of Local 34 (a sister local), and of the Association, to interpret and enforce the clause (Pet. App. 45; R. 129, 380–382).

The present case arose out of the Union's efforts to secure compliance with the fabrication clause on three jobs. These efforts were the subject of charges filed by petitioner with the Board alleging that the union and the Association had engaged in unfair labor practices in violation of Sections 8(b)(4)(ii)(A) and(B) and 8(e) of the Act.

1. THE 3–M PROJECT

In July 1963, Minnesota Mining and Manufacturing Co. (hereafter 3–M) ordered three packaged boilers for a building which it was remodeling in St. Paul, and contracted with D. W. Hickey Co. (a member of the Association) for their installation (Pet. App. 45).[4] On August 16, Union agent Mooney informed

[4] 3–M was not a member of the Association (Pet. App. 47, n. 7).

3–M that it was "going to have a problem", because Hickey's installation of the packaged boilers would violate the fabrication clause. Mooney also stated that the Union had historically performed the installation of "trim piping" on the boilers and that if Hickey's employees were directed to install the packaged boilers "they may refuse." (Pet. App. 45–46.) On August 27, the Fabrication Committee met, at the Union's request, to discuss, *inter alia,* the impending installation of packaged boilers at several St. Paul construction sites, including the 3–M project. The Committee agreed that Hickey would be in violation of the fabrication clause if it installed the packaged boilers as ordered, and that work on the project would cease if the issue were not resolved. Both Hickey and 3–M were advised of the Committee's decision (Pet. App. 46.)

On October 16, 3–M acceded to the Union's demand and directed the manufacturer not to attach the trim piping to the boilers prior to shipment. The manufacturer accordingly shipped the items separately. Upon inspection and approval by the Union, the boilers were then installed by Hickey's employees. (Pet. App. 46–47.)

2. THE PIERRE AIRCON PROJECT

In July 1963, Pierre Aircon Co. (a member of the Association) was awarded a subcontract to install a packaged boiler in a building under construction in St. Paul. After the boiler had been shipped to St. Paul, but prior to its delivery to the site, Aircon's president was requested to attend a meeting of the Fabrication

Committee. At the meeting, he was advised that Aircon would violate the fabrication clause if it accepted and installed a packaged boiler. The Committee later decided to permit Aircon to install the packaged boiler, provided it pay $100 to the St. Paul Industry Fund.[5] Aircon paid that amount and its employees installed the packaged boiler when it was delivered. (Pet. App. 51–52.)

3. THE UPPER MIDWEST PROJECT

Upper Midwest Piping, Inc., signed an agreement with the Union comparable to the Association agreement, upon receiving a contract to install two packaged boilers in a school in St. Paul.[6] After Upper Midwest had ordered the boilers from Cleaver-Brooks Co., but prior to their delivery, the Union told Upper Midwest that, under the fabrication clause in their agreement, the boilers should not arrive with the trim piping attached, for the installation of that piping was the Union's work. Although Upper Midwest then instructed Cleaver-Brooks to ship the boilers with the trim piping not attached, the boilers were nevertheless delivered in packaged form. At the time of the Board hearing, the packaged boilers were being installed by Upper Midwest's employees, who were members of

[5] The St. Paul Industry Fund is a trust fund established by the contract between the Union and the Association "for the purpose of developing more employment within the bargaining unit."

[6] Upper Midwest was a member of a Minneapolis Association which had a collective bargaining agreement with Local Union No. 539, a sister local. That agreement contained a fabrication clause similar to the one in the Union's agreement, and both agreements contained reciprocal clauses covering employer members working in either area. (Pet. App. 53–54.)

Local Union No. 539, the Union's sister local in Minneapolis. (Pet. App. 53–54.)

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board held that, under the principles set forth in *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U.S. 612, the fabrication clause was not a secondary or "hot cargo" agreement barred by Section 8(e) of the Act, but a lawful work preservation agreement.[7] For "* * * the record establishes that the work of attaching trim piping to boilers had traditionally been performed by employees in * * * units represented by Local Union No. 455; that the advent of packaged boilers had a direct impact on the amount of such work available to them; and that the Union's sole objective in obtaining agreement to the fabrication clause was to preserve and to reacquire such work for the unit employees of the contracting employers" (Pet. App. 79).

In addition, the Board held that what amounted to an *ad hoc* agreement between the Union on the one side, and the Association and Hickey on the other—which applied and effectuated the fabrication clause—was likewise not violative of Section 8(e) because, even if the Association and Hickey be regarded as secondary employers,[8] the agreement was protected

[7] The Board's first decision (Pet. App. 42–61) in the case was handed down before this Court's decision in *National Woodwork*, *supra*. The court below, on its review of the Board's first decision, remanded the case to the Board for reconsideration of several issues, and noted that certiorari had just been granted in *National Woodwork* (Pet. App. 62–74).

[8] Having contracted merely to install packaged boilers ordered by 3-M, they had no control over assignment of the trimming work at this project.

by the construction industry proviso to Section 8(e)[9] (Pet. App. 81). The Board declined to decide whether the Union's similar *ad hoc* agreement with 3–M was unlawful, since no violation respecting 3–M was alleged in the complaint (Pet. App. 81, n. 6). It held that the fine levied against Pierre Aircon was not unlawful, for the latter was a primary employer and the Union's objective was merely to obtain enforcement of its lawful work preservation clause (Pet. App. 83). Finally, the Board held that any agreement which the Union reached with Upper Midwest, even if it merely implemented the fabrication clause of a sister local's contract, nonetheless furthered a legitimate work preservation objective and thus was not unlawful (see *Houston Insulation Contractors* v. *National Labor Relations Board,* 386 U.S. 664) (Pet. App. 84–85).

Accordingly, the Board ordered that the unfair labor practice complaint be dismissed in its entirety (Pet. App. 85).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals agreed with the Board that, under the principles enunciated in *National Woodwork, supra,* the fabrication clause was a legitimate work preservation provision, not interdicted by Section 8(e) of the Act (Pet. App. 26–33). The court also agreed that the Union's actions with respect to

[9] That proviso exempts from the ban of Section 8(e) "an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction * * *" (Pet. App. 87).

Hickey, Aircon, and Upper Midwest were not unlawful (Pet. App. 33–36).[10] Contrary to the Board's conclusion, however, the court held that the issue whether the agreement between the Union and 3–M was violative of the Act had been fully presented in the proceeding and that that agreement violated Section 8(e).[11] Accordingly, the court sustained the Board's dismissal of the complaint, except for the part relating to the Union's agreement with 3–M; that matter the court remanded to the Board for the entry of an appropriate order (Pet. App. 38).[12]

ARGUMENT

National Woodwork Manufacturers Association v. *National Labor Relations Board*, 386 U.S. 612, held that the determination whether a contract provision barring the use of certain products and its enforcement "violated § 8(e) and § 8(b)(4)(B) cannot be made without an inquiry into whether, under all the surrounding circumstances, the Union's objective was preservation of work for [the unit] employees, or whether the agreements and

[10] Applying its holding in a companion case, *American Boiler Manufacturers Association* v. *National Labor Relations Board*, 404 F. 2d 556 (1968), where it had rejected the Board's "right-of-control" test, the court reached this conclusion solely on the ground that the Union's objective in each instance was merely the legitimate one of preserving traditional work for its members (Pet. App. 35–36). The petition does not directly raise the "right-of-control" issue (Pet. 3, n. 1).

[11] The court reasoned: "3–M was not a party to the original agreement and did not employ members of the bargaining unit. The agreement was not, therefore, directed at the labor policies of the primary employer." (Pet. App. 37.)

[12] The Board has not sought certiorari on this aspect of the case.

boycott were tactically calculated to satisfy union objectives elsewhere. * * * The touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-à-vis his own employees." *Id.* at 644–645. The sole question presented by the petition is whether the Board, whose finding was sustained by the court of appeals, correctly concluded, on the basis of the record in this case, that the objective of the Union's fabrication clause was "preservation of work" for the employees covered by its contract with the Association, and was not "tactically calculated to satisfy union objectives elsewhere." Such an issue, which turns essentially on the facts of the particular case, does not warrant review by this Court.

Moreover, there is ample evidentiary support for the Board's finding that the fabrication clause had a legitimate work preservation objective. As the court below noted (Pet. App. 24): "Prior to the use of packaged boilers, the boilers and the trim piping were shipped separately and assembled on the job site by members of the Union. The advent of packaged boilers resulted in a decrease of work at the job site for members. The work claimed took two men about two days for each installation."

National Woodwork may not be distinguished (see Pet. 15–19) on the ground that there the union was attempting to preserve work currently being done by unit employees, while here it was seeking to reacquire work previously performed by its members. As the court below pointed out, "[t]he record in *National Woodwork* demonstrates that the objective of the

Union was to reacquire, as well as preserve work" (Pet. App. 28).[13] Nor does the present case fall within the reservation in *National Woodwork* that there was no occasion in that case "* * * to decide the questions which might arise where the workers carry on a boycott * * * to monopolize jobs or acquire new job tasks when their own jobs are not threatened by the boycotted product" (386 U.S. at 630–631). The facts noted by the court below (*supra*, pp. 3, 7, 10) show that the packaged boilers actually diminished the work otherwise available to job site employees.

Petitioner's additional arguments (Pet. 5–7, 19) that packaged boilers are superior to field assembled boilers and that the result of enforcement of the fabrication clause will be to create employment problems for *its* members' employees are legally irrelevant. As the Court pointed out in *National Woodwork*, "Congress, in enacting § 8(e), had no thought of prohibiting agreements directed to work preservation" (386 U.S. at 640), irrespective of the impact of such agreements on neutral employers.[14]

[13] Thus, in *National Woodwork*, the Board had found that "one-third of the doors being shipped into the Philadelphia area by two large manufacturers, at the time the unfair labor practice charge was lodged, were precut or prefit doors" (Pet. App. 29, n. 7). Here, although the percentage of prefabrication was somewhat higher (60 to 85 percent), the unit employees were still performing 15 to 40 percent of the work which they were attempting to preserve.

[14] The Board cases relied on by petitioner (Pet. 20–21) were decided prior to this Court's decision in *National Woodwork*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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